

1 TROY A. STEWART, SBN 135764
2 P.O. Box 390
3 Glendale, California 91209-0390
4 Telephone: (626) 616-9474
5 Email: stewart1985@lawnet.ucla.edu

6 Attorney for Debtor and Defendant
7 PETER EMANUEL KVASSAY

8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 In re	) Case No.: 2:12-bk-40267-PC
)
11 PETER EMANUEL KVASSAY,	) Chapter 7
)
12 Debtor.	) Adversary No. 12-02577-PC
)
13	) Hon. Peter H. Carroll
14)
15 ROBERT KVASSAY, INDIVIDUALLY, AND	) DEFENDANT'S NOTICE OF MOTION
16 THE KVASSAY FAMILY TRUST DATED	) AND MOTION TO DISMISS CLAIMS FOR
17 FEBRUARY 26, 1993.	) NONDISCHARGEABILITY OF DEBT
	) PURSUANT TO 11 U.S.C. §§ 523(a)(2)(A),
18 Plaintiff,	) 523(a)(2)(B) and 523(a)(4); MEMORANDUM
	) OF POINTS AND AUTHORITIES IN
19 vs.	) SUPPORT THEREOF (FRBP 7012; FRCP
	) 12(b)(6))
20 PETER EMANUEL KVASSAY, AN	) DATE: February 19, 2013
21 INDIVIDUAL,	) TIME: 9:30 a.m.
	) PLACE: United States Bankruptcy Court
22 Defendant.	) Edward R. Roybal Federal Bldg.,
	) 255 E. Temple St., Courtroom 1468
23	) Los Angeles, CA 90012
24)

25 **TO THE HONORABLE PETER H. CARROLL, UNITED STATES BANKRUPTCY**
26 **JUDGE, PLAINTIFFS, AND PLAINTIFFS' ATTORNEY OF RECORD:**
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1 **PLEASE TAKE NOTICE** that on February 19, 2013, at 9:30 a.m., in Courtroom 1468 of the
2 United States Bankruptcy Court located in the Edward R. Roybal Federal Building at 255 E. Temple
3 Street, Los Angeles, California 90012, defendant PETER EMANUEL KVASSAY (“defendant”) will
4 and hereby does move the Court pursuant to FRBP 7012 and FRCP 12(b)(6) for an order dismissing
5 the claims alleged in the complaint filed by plaintiffs ROBERT KVASSAY and THE KVASSAY
6 FAMILY TRUST DATED FEBRUARY 26, 1993, for nondischargeability of a debt pursuant to 11
7 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B) and 523(a)(4).
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11 As set forth in the attached Memorandum of Points of Authorities, plaintiffs’ complaint fails
12 to state a claim for nondischargeability of a debt under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B) and
13 523(a)(4) because there are no allegations: (1) that either plaintiff relied upon any false pretense or
14 false representation made by defendant *or* false statement concerning defendant’s financial condition;
15 or (2) of a debt for fraud or defalcation while defendant was acting in a fiduciary capacity,
16 embezzlement, or larceny. Defendant’s motion is based upon this Notice, the moving papers, the
17 Memorandum of Points and Authorities attached hereto, the allegations of plaintiffs’ complaint, the
18 record in the case, and the parties’ oral argument at the hearing on defendant’s motion.
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22 **WHEREFORE**, defendant PETER EMANUEL KVASSAY prays that the Court enter an
23 Order dismissing plaintiffs’ claims for nondischargeability of a debt under 11 U.S.C. §§
24 523(a)(2)(A), 523(a)(2)(B) and 523(a)(4) with prejudice.
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**LOCAL BANKRUPTCY RULE 9013-1(f) REQUIRES A WRITTEN RESPONSE TO
BE FILED AND SERVED AT LEAST 14 DAYS BEFORE THE HEARING.**

Dated: January 4, 2013


TROY A. STEWART, Attorney for
Defendant, PETER EMANUEL
KVASSAY

MEMORANDUM OF POINTS AND AUTHORITIES

A. The complaint does *not* allege that defendant obtained “money, property, services, or an extension, renewal, or refinancing of credit” based on *false pretenses or false representations* *relied upon by either plaintiff* as required to state a claim under 11 U.S.C. § 523 (a)(2)(A)

Under 11 U.S.C. § 523(a)(2), “[a] discharge under [11 U.S.C. § 727] ... does not discharge an individual debtor from any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by —

“(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition[.]”

A claim under section 523(a)(2)(A) requires that the plaintiff (the creditor) relied on a false representation or false pretense made by the defendant. (See, *Field v. Mans*, 516 U.S. 59, 66 (1995); *In Goldberg Securities, Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 524-525 (1992).)

The complaint alleges that defendant obtained loan proceeds of \$1.5 million from *an unidentified third party lender* after he “fraudulently certified and represented himself as the Trustee of the Trust” and “Defendant knew and concealed from the lenders the material fact that he had resigned as Trustee and could no longer act on behalf of the Trust.” (See, Complaint, 4:6-8, 14-16.)

1 The complaint further alleges “[t]hat, as a result of defendant’s deception, Defendant received said
2 funds and Defendant has been unable to satisfactorily account for the funds received from the loan in
3 question.” (See, Complaint, 4:19-21.) Finally, the complaint alleges that “Defendant did maintain
4 payments to the Note holder until mid-2009” but that “[t]hereafter, Defendant refused to pay and the
5 plaintiff (individually) was forced to obtain a personal loan for the same amount to prevent
6 foreclosure of the property.” (See, Complaint, 5:3-7.)
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10 The complaint does *not* allege that defendant obtained any “money, property, services, or an
11 extension, renewal, or refinancing of credit” *on the basis of any false representation or false pretense*
12 *made by defendant to either plaintiff upon which either plaintiff relied*. Rather, the complaint alleges
13 only that defendant obtained a \$1.5 million loan from *an unidentified third party lender* based on an
14 alleged false representation he allegedly made to *the unidentified third party lender*. Absent any
15 allegations that defendant obtained any “money, property, services, or an extension, renewal, or
16 refinancing of credit” *on the basis of any false representation or false pretense made by defendant to*
17 *either plaintiff upon which either plaintiff relied*, the complaint does *not* state a claim under section
18 523(a)(2)(A).
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1 **B. The complaint does *not* allege that defendant obtained “money,**
2 **property, services, or an extension, renewal, or refinancing of**
3 **credit” based on *a false statement concerning defendant’s***
4 ***financial condition that was relied upon by either plaintiff***
5 **as required to state a claim under 11 U.S.C. § 523 (a)(2)(B)**
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8 Under 11 U.S.C. § 523(a)(2), “[a] discharge under [11 U.S.C. § 727] ... does not discharge an
9 individual debtor from any debt ... for money, property, services, or an extension, renewal, or
10 refinancing of credit, to the extent obtained by ...
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13 “(B) use of a statement in writing —

- 14 (i) that is materially false;
15 (ii) respecting the debtor’s or an insider’s financial condition;
16 (iii) on which the creditor to whom the debtor is liable for such
17 money, property, services, or credit reasonably relied; and
18 (iv) that the debtor caused to be made or published with the
19 intent to deceive[.]”
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23 The complaint does *not* allege that defendant obtained any “money, property, services, or an
24 extension, renewal, or refinancing of credit” *on the basis of a written statement that falsely*
25 *represented his financial condition that was relied upon by either plaintiff.* Rather, the only
26 allegations in the complaint concerning any written statement are that plaintiffs were damaged by the
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1 “use of statements in writing holding forth defendant as successor
2 trustee of plaintiff Trust to the actual detriment of the initial lender
3 and plaintiffs, that the debtor caused to be made or published with
4 intent to deceive”
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7 (See, Complaint, 6:22-25.) There are no allegations in the complaint that either plaintiff relied upon
8 any written statement concerning defendant’s financial condition. Absent any allegations that
9 defendant obtained any “money, property, services, or an extension, renewal, or refinancing of
10 credit” *on the basis of a written statement that falsely represented his financial condition that was*
11 *relied upon either plaintiff*, the complaint does *not* state a claim under section 523(a)(2)(B).
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14 **C. The complaint does not allege a debt for fraud or defalcation while**
15 ***defendant was acting in a fiduciary capacity or embezzlement or***
16 ***larceny as required to state a claim under 11 U.S.C. § 523 (a)(4)***
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19 Under 11 U.S.C. § 523(a)(4), “[a] discharge under [11 U.S.C. § 727] ... does not discharge an
20 individual debtor from any debt ... for fraud or defalcation *while acting in a fiduciary capacity,*
21 *embezzlement, or larceny[.]*” (*Italics added.*) In the context of section 523(a)(4), “the fiduciary
22 relationship must be one arising from an express or technical trust that was imposed before and
23 without reference to the wrongdoing that caused the debt.” (*Lewis v. Scott (In re Lewis)*, 97 F.3d
24 1182, 1185 (9th Cir. 1996).) “ ‘In the context of section 523(a)(4), the term “defalcation” includes
25 innocent, as well as intentional or negligent defaults so as to reach the conduct of all fiduciaries who
26 were short in their accounts.’ ” (*In re Lewis, supra*, 97 F.3d at 1186 [citing *In re Baird*, 114 B.R.
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1 198, 204 (9th Cir. BAP 1990)].)

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3 The complaint alleges that “Defendant fraudulently certified and represented himself as the
4 Trustee of the Trust when, in reality, defendant was not the Trustee of the Trust[]” and Defendant
5 made these false representations deliberately in order to obtain the loan proceeds of \$1,500,000.00
6 secured against the Trust property.” (*See*, Complaint, 4:6-11.) The complaint further alleges that
7 “Defendant knew and concealed from the lenders the material fact that he had resigned as Trustee
8 and could no longer act on behalf of the Trust.” (*See*, Complaint, 4:14-16.) The allegations of the
9 complaint plainly and clearly state that defendant was *not* the true trustee of the “Trust.” Thus,
10 plaintiffs deny that defendant was acting in a “fiduciary capacity” as required to state a claim under
11 section 523(a)(4) “for fraud or defalcation *while acting in a fiduciary capacity.*”
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15 Embezzlement is the fraudulent appropriation of property by a person to whom such property
16 has been entrusted, or into whose hands it has lawfully come. (*In re Bucci*, 493 F.3d 635, 644(6th
17 Cir. 2007); *In re Miller*, 156 F.3d 598, 602 (5th Cir. 1998).) As stated, the complaint alleges that
18 defendant obtained a \$1.5 million loan based on a *false representation to an unidentified third party*
19 *lender* that he was a trustee of a “Trust.” (*See*, Complaint, 4:6-11, 14-16.) Thus, plaintiffs deny that
20 the alleged \$1.5 million loan was entrusted to or lawfully in the possession of defendant as required
21 to state a claim for embezzlement under section 523(a)(4).
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25 A claim under section 523(a)(4) may be based on allegations of larceny. The complaint does
26 *not* allege a claim under section 523(a)(4) based on any allegations that defendant committed larceny.
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1 **D. Conclusion**

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3 Based on the foregoing points and authorities, defendant PETER EMANUEL KVASSAY
4 respectfully requests that the Court enter an Order dismissing plaintiffs' claims for
5 nondischargeability of a debt under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B) and 523(a)(4) with
6 prejudice.
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9 DATED: January 4, 2013
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13 TROY A. STEWART, Attorney for
14 Defendant, PETER EMANUEL
15 KVASSAY
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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
P.O. Box 390, Glendale, California 91209-0390

A true and correct copy of the foregoing document entitled (*specify*): Defendant's Notice of Motion and Motion to Dismiss Claims for Nondischargeability of Debt Pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B) and 523(a)(4); Memorandum of Points and Authorities in Support Thereof (FRBP 7102; FRCP 12(b)(6))

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) 01/04/2013, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Richard R. Clements, Law Offices of Richard R. Clements, 1154 E. Wardlow Road, Long Beach, CA 90807
Office of the United States Trustee, 725 So. Figueroa St., Suite 2600, Los Angeles, CA 90017

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) 01/04/2013, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Judge Peter H. Carroll, Edward R. Roybal Building and Courthouse, 255 E. Temple Street, Bin outside Suite 1460, Los Angeles, CA 90012

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

01/04/2013
Date

Troy A. Stewart
Printed Name

Signature 